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COURT OF APPEALS  
DIVISION II

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No. 37281-9-II

STATE OF WASHINGTON

BY [Signature]  
DEPUTY

COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

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Ted Spice and Plexus Development, LLC, Appellants

v.

Pierce County, a political subdivision, Respondent,

and

City of Puyallup, a municipal corporation, Respondent.

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BRIEF OF RESPONDENT CITY OF PUYALLUP

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Kevin J. Yamamoto  
Senior Assistant City Attorney  
Attorney for City of Puyallup  
City of Puyallup  
330 3rd Street, S.W.  
Puyallup, WA 98371  
253-841-5598  
WSBA No. 26787

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## **I. INTRODUCTION**

After Ted Spice and Plexus Development, LLC (Plexus) failed to prosecute their RCW 36.70C land use petition for nearly ten months, the Pierce County Superior Court dismissed the petition with prejudice. Mr. Spice and Plexus failed to move the court to reconsider its dismissal or appeal the dismissal. Rather, almost thirteen months later, Mr. Spice and Plexus moved the superior court to vacate its order of dismissal. The superior court declined to vacate its dismissal order.

## **II. ASSIGNMENTS OF ERROR**

Respondent City of Puyallup assigns no error.

## **III. STATEMENT OF THE CASE**

On February 2, 2006, Mr. Spice and Plexus (Petitioners) filed a petition for judicial review, under the Land Use Petition Act (LUPA), RCW 36.70C, of two decisions of the Pierce County Hearing Examiner. CP 1-28. After failing to prosecute their LUPA petition for nearly ten months, Petitioners strangely attempted to withdraw their LUPA petition on November 17, 2006. CP 29. Petitioners' withdrawal was a single page pleading that made no reference to any statute, case law, regulation or rule, including CR 41. CP 29.

On November 22, 2006, Respondent Pierce County moved the court for an order of dismissal with prejudice. CP 34-37. A hearing on

the motion occurred on December 8, 2006. CP 183-184. Only attorneys for Pierce County and the City of Puyallup appeared at the hearing. CP 183-184. The court granted the motion, and dismissed the petition with prejudice. CP 69-70. Petitioners failed to seek reconsideration of the dismissal order, and failed to appeal the dismissal order.

In January of 2008, almost thirteen months after the court dismissed the LUPA petition, Petitioners, pursuant to CR 60, moved the superior court to vacate its December 8, 2006 Order of Dismissal with Prejudice. CP 71-95. The superior court denied Petitioners' motion to vacate on January 11, 2008. CP 175, 156. The court reasoned that (1) its December 8, 2006 Order of Dismissal with Prejudice was not void; (2) the motion to vacate was untimely; and (3) errors of law need to be appealed rather than vacated as void judgments. RP 15.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. The December 8, 2006 Order of Dismissal with Prejudice was not void.**

A judgment, decree or order entered by a court which lacks inherent power or jurisdiction over the parties or the subject matter is void. *Marriage of Ortiz*, 108 Wash. 2d 643, 649, 740 P.2d 843 (1987). *Dike v. Dike*, 75 Wash. 2d 1, 7, 448 P.2d 490 (1968). *State v. Ward*, 125 Wash. App. 374, 379, 104 P.3d 751 (2005). However, when a court has

jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void. *Ortiz*, 108 Wash. 2d at 649. *Dike*, 75 Wash. 2d at 8. In fact, a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. *Ortiz*, 108 Wash. 2d at 649, 650. *Dike*, 75 Wash. 2d at 8. *Ward*, 125 Wash. App. at 379. This is true even if there is a fundamental error of law appearing upon the face of the record. *Ortiz*, 108 Wash. 2d at 650. *Dike*, 75 Wash. 2d at 8. *Ward*, 125 Wash. App. at 379. Such a judgment is voidable, but until avoided is regarded as valid. *Ortiz*, 108 Wash. 2d at 650. *Dike*, 75 Wash. 2d at 8.

In this case, the Pierce County Superior Court had jurisdiction over the subject matter of the action. Pursuant to RCW 36.70C.030 and RCW 36.70C.040, superior courts have exclusive authority to review land use decisions. In addition, the court had jurisdiction over the parties. Petitioners invoked the jurisdiction of the superior court by filing their petition for review, and once Respondents were served with process, they were subject to the jurisdiction of the superior court.

Because the court had jurisdiction over the subject matter in this case, and over the parties, its December 8, 2006 Order of Dismissal with Prejudice was not void. At best, the order was voidable. Thus, CR 60(b)(5) was and is inapplicable in this case.

**B. Petitioners' motion to vacate was untimely filed.**

A motion to vacate under CR 60(b)(5) or CR 60(b)(11) must be made within a reasonable time. CR 60(b). See *Luckett v. Boeing Company*, 98 Wash. App. 307, 311, 989 P.2d 1144 (1999). What constitutes a reasonable time depends on the facts and circumstances of each case. *Luckett*, 98 Wash. App. at 312. The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. *Luckett*, 98 Wash. App. at 312.

In this case, Petitioners knew that the Order of Dismissal with Prejudice was entered on December 8, 2006. Petitioners simply failed to file a motion to vacate for thirteen months. Thus, Petitioners' motion was untimely.

**C. An appeal is the proper method to correct an error of law.**

Washington law does not permit errors of law to be corrected through vacation of judgments or orders:

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court



to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion.

(This rule is pervasive and longstanding.) *Burlingame v. Consolidated Mines and Smelting Company*, 106 Wash. 2d 328, 336, 722 P.2d 67 (1986); *Green v. Superior Court for King County*, 58 Wash. 2d 162, 165, 361 P.2d 643 (1961); *Kern v. Kern*, 28 Wash. 2d 617, 619, 183 P. 2d 811 (1947); *In re Jones' Estate*, 116 Wash. 424, 428, 199 P. 734 (1921); *Faulkner v. Faulkner*, 90 Wash. 74, 79, 155 P. 404 (1916).

In this case, Petitioners sought vacation of the December 2006 order of dismissal on the basis of an alleged error by the court, rather than something extraneous to the action of the court. If an error occurred, Petitioners should have appealed the order. Petitioners failed to do so, and consequently, their opportunity to address the alleged error expired. The superior court properly did not permit Petitioners Spice and Plexus to use the CR 60 vacation procedure as a substitute for an appeal.

**D. Respondents are entitled to attorney fees and costs.**

Respondent City of Puyallup requests attorney fees and costs under RAP 18.1 and 18.9(a), which permits such an award against a party who

files a frivolous appeal. An appeal is frivolous under RAP 18.9 if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. State, Dept. Of Transportation*, 128 Wash. App. 895, 900, 117 P.3d 1152 (2005) (citing *State ex rel. Quick-Ruben v. Verharen*, 136 Wash. 2d 888, 905, 969 P.2d 64 (1998)).

This appeal raises no debatable issues and is devoid of merit. If the superior court erred by dismissing the case with prejudice, then Petitioners Spice and Plexus could have moved the court to reconsider, or appealed the dismissal order. Petitioners failed to do either. Rather, approximately thirteen months later, they sought to use the inapplicable vacation procedure under CR 60. For nearly a century, and perhaps more than a century, the Washington Supreme Court has ruled that errors of law must be corrected, not through vacation, but on appeal. This longstanding rule should have been no surprise to Petitioners.

If Petitioners truly thought that they had obtained a valid voluntary dismissal of their petition pursuant to CR 41 on November 17, 2006, then they should have been aware that the time to file their petition would have again begun to run and expire shortly thereafter. Once the time period for filing a land use petition expires, the petition is barred, and the court may not grant review. RCW 36.70C.040(2). A petition is timely if it is filed and served on all parties within twenty-one days of the issuance of the

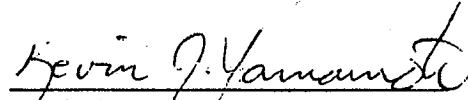
land use decision. RCW 36.70C.040(3). Pursuant to RCW 36.70C.040, the time to file the petition, or in this case, re-file, had long expired when Petitioners moved the court for vacation in January of 2008. Thus, both the motion to vacate and this appeal are frivolous. Accordingly, this Court should award attorney fees and costs under RAP 18.1 and 18.9(a) to Respondent City of Puyallup.

#### V. CONCLUSION

Respondent City of Puyallup requests that the Court affirm the Pierce County Superior Court's Order of Dismissal with Prejudice that was entered on December 8, 2006.

Respectfully submitted,

Dated: July 3, 2008

  
Kevin J. Yamamoto 26787  
Senior Assistant City Attorney  
Attorney for City of Puyallup  
City of Puyallup  
330 3rd Street, S.W.  
Puyallup, WA 98371  
253-841-5598

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**IN THE COURT OF APPEALS OF THE STATE  
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TED SPICE AND PLEXUS  
DEVELOPMNET, LLC,

Appellants,

vs.

PIERCE COUNTY, a political  
subdivision, and CITY OF PUYALLUP,  
a municipal corporation,

Respondents.

**No. 37281-9-II**

**DECLARATION OF SERVICE**

I, Kevin J. Yamamoto, declare that on the 3rd day of July, 2008, I caused a true and correct copy of the Brief of Respondent City of Puyallup to be served on the following persons in the manner indicated below:

Delivery by leaving a copy with a clerk at her office, which located at the following address:

Carolyn Lake  
Goodstein Law Group PLLC  
1001 Pacific Avenue, Suite 400  
Tacoma, WA 98402  
(253) 229-6727

Delivery by leaving a copy with a clerk at his office, which located at the following address:

**David B. St.Pierre**  
**Deputy Prosecuting Attorney**  
**Pierce County Prosecuting Attorney - Civil Division**  
**955 Tacoma Avenue South, Suite 301**  
**Tacoma, WA 98402**  
**253-798-6503**  
**WSBA No. 27888**

**Service by mailing a copy, postage prepaid, to the following address:**

**Michael C. Walter**  
**Keating Bucklin & McCormack, Inc., P.S.**  
**800 5th Avenue, Suite 4141**  
**Seattle, Washington 98104**  
**206-623-8861, ext. 34**  
**WSBA No. 15044**

Dated: July 3, 2008

*Kevin J. Yamamoto*  
Kevin J. Yamamoto 26787  
Senior Assistant City Attorney